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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 159

CARROLL L. JOHNS, PETITIONER,

VS.

ASSOCIATED AVIATION UNDERWRITERS ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

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SUBJECT INDEX

Petition for Writ of Certiorari

Summary and Statement of Matter Involved 2
Jurisdictional Statement 5
Questions Presented 5
Reasons Relied on for the Allowance of the Writ 6
Conclusion and Prayer 9

Brief in Support of Petition

Reference to Official Report 11
Jurisdictional Statement 12
Statement of Case 12
Specification of Errors 16
Summary 18

Argument—

I. First Point—Defense of qualified privilege must be based upon a lawful duty or interest 20
Second Point—Duty of Associated Aviation Underwriters to make inspections and reports part of unlawful combination 20
Third Point—A partnership of corporations is unlawful 20

II. Fourth Point—The obligation or duty to make inspections and reports were an essential part of the unlawful combination which created Associated Aviation Underwriters and could be urged in opposition to a claim of qualified privilege 32

III. Fifth Point—Proof of gross negligence or indifference in publishing a libelous statement will destroy the defense of qualified privilege in lieu of actual malice 36

Sixth Point—Whether the negligence or indifference was gross or ordinary is a jury question ____ 36

Seventh Point—The lower courts erred in granting the instructed verdict under the evidence ____ 36

IV. Eighth Point—The Court of Appeals erred in relying upon the decision of Express Publishing Co. vs. Wilkins, 218 S. W. 614, which involved a defense of reasonable and fair comment by a newspaper ____ 48

Ninth Point—If said case be held to apply then the associated doctrine that defense of privilege does not extend to false statements of fact should also apply ____ 48

Conclusion ____ 50

Appendix ____ 51

TABLE OF CASES

Ballard vs. Atchison, T. & S. F. Ry. Co., 100 F. 2d 162 ____ 7, 44

Bell Publishing Co. vs. Garrett Engineering Co., 141 Tex. 51, 170 S. W. 2d 197 ____ 39, 49

A. H. Belo & Co. vs. Looney, 112 Tex. 160, 246 S. W. 777 ____ 49

E. Bement & Sons vs. National Harrow Co., 186 U. S. 70, 22 S. Ct. 747, 46 L. Ed. 1058 ____ 33

Brown Paper Mill Co. vs. Agar Mfg. Corp., 1 F. R. D. 579 ____ 35

Carruth vs. Dallas Gas Co., 282 S. W. 334 ____ 37

Continental Wallpaper Co. vs. Voight & Sons Co., 212 U. S. 227, 29 S. Ct. 280, 53 L. Ed. 684 ____ 34

Connolly vs. Union Sewer Pipe Co., 184 U. S. 540 ____ 32

Copp vs. Van Hise, 119 F. 2d 691 ____ 7, 45

Daniel vs. Tyrrell & Garth Inv. Co., 126 Tex. 213, 93 S. W. 2d 372 ____ 20

Evans vs. McKay, 212 S. W. 680 ____ 41

Express Publishing Co. vs. Wilkins, 218 S. W. 614 ..... 18, 48
Ferguson vs. Houston Press Co., 1 S. W. 2d 387, affirmed 12 S. W. 2d 125 48
Fitzjarrald vs. Panhandle Publishing Co., 228 S. W. 2d 499 37
Ford vs. Southwestern Greyhound Lines, 180 F. 2d 934 ..... 6, 43
Galveston Tribune vs. Johnson, 141 S. W. 302, w. e. ref. 49
Guisti vs. Galveston Tribune, 105 Tex. 497, 150 S. W. 874 38
Houston Chronicle Publishing Co. vs. Bowen, 182 S. W. 61 40
Houston Chronicle Publishing Co. vs. Wegner, 182 S. W. 45, w. e. ref. 40
International & G. N. R. Co. vs. Edmundson, 222 S. W. 181 37
LeMaster vs. Ft. Worth Transit Co., 160 S. W. 2d 224, 138 Tex. 512 ..... 6, 43
Moore vs. Leverett, 52 S. W. 2d 252 49
Morton Salt Co. vs. Wells, 35 S. W. 2d 454 44
Nattens vs. Grolier Society, 195 F. 2d 449 ..... 7, 45
Sola Electric Co. vs. Jefferson Electric Co., 63 S. Ct. 172, 317 U. S. 173, 87 L. Ed. 165 33
Stevens et al. vs. Karr, 119 Tex. 479, 33 S. W. 2d 725 ..... 6, 44
Thomas vs. Postal Telegraph Co., (Tex. Com. App.) 65 S. W. 2d 282 ..... 6, 42
United States vs. Bob, 106 F. 2d 37, cert. den. 308 U. S. 589 35
United States vs. Southeastern Underwriters Ass'n, 64 S. Ct. 1162, 322 U. S. 533 25
White vs. White, 141 Tex. 328, 172 S. W. 2d 295 ..... 6, 42, 43

TEXTS AND STATUTES

Article 3.57, Texas Insurance Code 25, 53
Article 4686, R. C. S. of Texas 24
Article 5430, R. C. S. of Texas, 1925 ..... 38, 53
Article 5432, R. C. S. of Texas, 1925 48
Article 7426, Secs. 2, 3, 4, and 5, R. S., 1925 ..... 22, 51
36 C. J. 1238 30
53 C. J. S. 139 30
53 C. J. S. 140 30
53 C. J. S. 142 31
53 C. J. S. 147 29
53 C. J. S. 149 30
58 C. J. S. 1108 33
58 C. J. S. 1109 33
Sec. 1, Tit. 15, U. S. C. A. 25
Sec. 2, Tit. 15, U. S. C. A. 25
Sec. 3, Tit. 15, U. S. C. A. 26
Sec. 1012, Tit. 15, U. S. C. A. 25, 52
10 Tex. Jur. 385 22
24 Tex. Jur. 853 23
27 Tex. Jur. 603 39
34 Tex. Jur. 1321 20
28 U. S. C. 1254 (1) 5, 12

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Carroll Lee Johns, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit rendered April 3, 1953, in the above cause which affirmed a judgment of the United States District Court for the Southern District of Texas, at Houston, rendered against your petitioner on an instructed verdict whereby he was denied a trial by jury.

Petitioner asks that said writ issue as to all appellees in the court below except Superior Oil Company.

SUMMARY AND STATEMENT OF MATTER INVOLVED.

Petitioner was employed in 1948 by the Superior Oil Company as an aircraft pilot. He was discharged by that company about November 22, 1948, as the result of a report by Associated Aviation Underwriters delivered to Superior Oil Company which stated in effect that petitioner was a poor or incompetent pilot, that he had failed or refused to comply with his previous employers' desires or verbal instructions, that he had poor personal habits and traits and that he had no Airline Transport Rating (ATR) all of which petitioner alleged to be false.

It was in effect admitted at the trial that the last charge was wholly false, namely that at the time of said report Johns had an Airline Transport Rating, which is the highest rating in the United States that a pilot can secure, and had been so rated for many years prior to the report.

Associated Aviation Underwriters is an active association of some sixty-one (61) different insurance companies (R. 382) and this particular risk (Superior Oil Company) was divided among thirty-two (32) insurance companies (R. 459). Associated Aviation Underwriters is one of the two great chains of insurance companies that handle aviation insurance in the United States. There are, of course, a few independent companies that write such insurance but the greater part of all aviation insurance in the United States is handled through Associated Aviation Underwriters or another concern of the same type.

Associated Aviation Underwriters is an entity. It can sue and be sued and has officers and employees. It main-

tains offices in New York, Atlanta, Chicago, Los Angeles, Kansas City, Dallas and San Francisco (R. 486, 451).

It is obvious that if Johns were libeled by such a gigantic combination he faces professional and financial ruin as a pilot and all his knowledge and experience would be destroyed.

He cannot get work from any industry which obtains its insurance through the combination known as Associated Aviation Underwriters. If a prospective employer should happen to handle its aviation insurance through the other great combination of insurance companies, nevertheless, the criticism or finding that he was incompetent, no matter how spurious, by Associated Aviation Underwriters would be available. No insurance company would write insurance for a company that hired Johns. He was for all practical purposes blacklisted for all time.

The district court held the communication was qualifiedly privileged and instructed the jury to return a verdict in favor of the defendants because no personal ill will or animus had been shown.

Petitioner contended that no legal or moral duty rested upon said association to make a report on Johns; that the combination of insurance companies was an unlawful combination and that the law therefore could not recognize a statement as privileged which could arise only from lawful relationships. He also alleged that the insurance companies were grossly negligent in their investigation of Johns' flying ability, skill, previous record and qualifications, making the charges against him recklessly and wantonly.

The Court of Appeals found that there was ample basis in the evidence for a jury finding that there was no suf-

ficient investigation to justify the statements against Mr. Johns but the court stated that it did not think the evidence was sufficient to submit to the jury the issue of gross negligence.

Petitioner alleged that the combination of insurance companies violated both state and federal statutes and the Court of Appeals holding that there was evidence of negligence but not sufficient evidence to submit the issue of gross negligence, was contrary to the great weight of authority in the United States which is to the effect that it is a question for the jury to determine as to whether the negligence was ordinary or gross. This is true not only in Texas and in the Fifth Circuit but it is the weight of authority in all of the state decisions and federal decisions that we have investigated with reference to this matter. If there was any evidence of petitioner's allegations then the same should have been submitted to the jury.

Petitioner also contended that Associated Aviation Underwriters owed no duty of any kind with reference to Johns except such duty as arose out of the unlawful combination of said insurance companies which divided the Superior Oil Company risk. Said combination violated not only various state acts but the Sherman Act, Clayton Act and the Federal Trade Commission Act.

The district court refused to allow petitioner to allege the unlawful combination and refused to allow petitioner to prove same.

Various parts of various depositions were either stricken or refused admission when petitioner offered same to establish the unlawful combination

It is petitioner's contention that the defense of conditional privilege is a legal defense and must arise from lawful and valid relationships and cannot be spawned by illegal relationships.

JURISDICTIONAL STATEMENT.

Jurisdiction to review this case on writ of certiorari is based upon 28 U. S. C. 1254 (1).

The judgment of the Court of Appeals for the Fifth Circuit was entered April 3, 1953. The issuance of a mandate in this cause was stayed by order of the Court of Appeals until July 2, 1953, pending the filing of this petition for certiorari.

QUESTIONS PRESENTED.

(1) Can the defense of conditional or qualified privilege in a libel action be urged when libelous communication is made pursuant to, and grew out of, an unlawful combination of corporations in violation of both state and federal law, particularly where the plaintiff is denied the right to develop his case either by pleading such allegations or proving same by deposition or otherwise?

(2) Is the defense of qualified or conditional privilege destroyed by proof that the libelous statement was made wantonly or with gross negligence or indifference? The Court of Appeals held that proof of spite or ill will was necessary.

(3) Is the question of whether the negligence is ordinary or gross a question of fact for the jury, particularly where the evidence shows the libelous statement included a misstatement of fact about which the defendants made no investigation whatsoever, that is, that Johns did not have an Airline Transport Rating or License, when he had been so licensed for many years, and was at the time of the untrue report?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The holding of the lower courts that there was insufficient evidence to justify submitting the case to the jury is a decision involving an important question of local law which is in conflict with the applicable local decisions.

(a) The lower courts in so holding failed and refused to view the evidence in the light most favorable to petitioner and indulge against the instruction every inference that may be properly drawn from the evidence as is required by the decisions of the appellate courts of Texas. *Thomas* v. *Postal Telegraph-Cable Co.,* (Tex. Com. App.) 65 S. W. 2d 282. This local rule of decision has been recognized in many cases not only in Texas but by the Fifth Circuit Court of Appeals. *Ford* v. *Southwestern Greyhound Lines,* 180 F. 2d 934.

That decision relied upon a recent decision by the Supreme Court of Texas in *White* v. *White,* 141 Tex. 328, 172 S. W. 2d 295, which is cited on pages 70 and 71 of our brief filed with the Court of Appeals. The court there summarized the various rules violated by the lower courts in this case in denying petitioner a jury trial.

(b) That case also cited the case of *Stevens et al.* v. *Karr,* 119 Tex. 479, 33 S. W. 2d 725, to the effect that a peremptory instruction is warranted only when the evidence is such that no other verdict can be rendered and the winning party is entitled, as a matter of law, to judgment. To the same effect is the decision in *LeMaster* v. *Ft. Worth Transit Co.,* 160 S. W. 2d 224, 138 Tex.

512, wherein the Supreme Court of Texas held that even if the evidence were not conflicting, if reasonable minds might differ as to its effect still a fact issue is presented and the case should be submitted to the jury. The Court of Appeals for the Fifth Circuit has followed these rules many times as is evidenced by the decision of *Ballard* v. *Atchison, T. & S. F. Ry. Co.*, 100 F. 2d 162.

(c) The Supreme Court of Texas and the Court of Appeals for the Fifth Circuit hold that every inference that can properly be drawn from the evidence must be indulged against the instruction. They are in effect saying what has been put more bluntly by various decisions by the Court of Appeals for the Ninth Circuit which has held many times that whether there was gross or ordinary negligence is a question of fact to be determined by the jury. *Copp* v. *Van Hise*, 119 F. 2d 691.

To the same effect see *Nattens* v. *Grolier Society*, 195 F. 2d 449, decided by the Court of Appeals for the Seventh Circuit, holding that whether negligent conduct amounted to gross negligence when the evidence with all its reasonable inferences is taken in an aspect most favorable to the plaintiff is a question for the jury.

The Court of Appeals in the instant case held that a jury might have found that there was no sufficient investigation to justify the statements made against Johns but that the evidence was not sufficient to submit the issue of gross negligence or indifference. We submit that is a jury question.

The Court of Appeals for the Fifth Circuit in this case has rendered a decision not only in conflict with the decisions of the Supreme Court of Texas but also in conflict with its own previous decisions and various decisions of other Circuit Courts of Appeal.

II.

This case involves a question of general public interest and importance, namely, whether or not the defense of conditional or qualified privilege can be urged when the libelous statement resulted from an illegal combination or arrangement between some 61 insurance companies 32 of same dividing this particular risk concerning the Superior Oil Company's fleet of airplanes and the personnel operating the same. Respondents contended that Associated Aviation Underwriters was the aviation department of the 61 companies. If that is true we contend that many of said companies were unlawfully doing business in Texas in violation of the Texas Insurance Code and were operating unlawfully as partners in violation not only of the Texas statutes but the Sherman Act, Clayton Act and the Federal Trade Commission Act.

If any duty rested upon Associated Aviation Underwriters with reference to the libelous statements made to Superior Oil Company then it was an unlawful duty and could not give rise to the defense of conditional or qualified privilege, which is a defense based upon a legal right and lawful relationship. If no duty rested upon Associated Aviation Underwriters to make the said report, then the association and its member companies were mere meddlers indulging in cheap gossip.

We submit that the Court of Appeals has confused the defense of absolute privilege with the defense of qualified or conditional privilege. Neither can be urged under the facts of this case. In considering this record the allegations of petitioner as to the illegal nature of the said association should be taken as true.

CONCLUSION.

We submit that it is of the gravest importance for this Court to decide whether a defense of conditional or qualified privilege can be urged as a complete bar to a plaintiff's action for libel when no duty with reference to the subject matter of the libel rested upon the party publishing same, except an illegal duty arising out of an unlawful combination.

Wherefore, petitioner prays that a writ of certiorari issue herein and that on proper hearing said decision of the Court of Appeals for the Fifth Circuit be reversed and this cause remanded for trial and that petitioner be granted such further relief to which he may be justly entitled.

Dated June ____, 1953.

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Houston, Texas,
Attorney for Petitioner.

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OCTOBER TERM, 1953.

No._____.

CARROLL L. JOHNS, PETITIONER,

VS.

ASSOCIATED AVIATION UNDERWRITERS ET AL., RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

REFERENCE TO OFFICIAL REPORT.

The United States District Court for the Southern District of Texas at Houston did not write an opinion in this case. The decision of the United States Court of Appeals for the Fifth Circuit is reported in 203 F. 2d 208.

JURISDICTIONAL STATEMENT.

The statutory provision believed to sustain the jurisdiction of this Court is Sec. 1254 of Title 28, United States Code. The date of the judgment sought to be reviewed is April 3, 1953, which is based on an opinion by the Court of Appeals for the Fifth Circuit of the same date reported in 203 F. 2d 208. The date of this Application for Certiorari is June ____, 1953.

As is set forth in the Petition for Writ of Certiorari, under the heading "Reasons Relied on for the Allowance of the Writ," the decision of the Court of Appeals in this case conflicted with the applicable local decisions of the highest court of the State of Texas and various decisions of the Court of Appeals of the United States for the Fifth Circuit and other courts. Said decision involved an important question of local law with reference to the granting of instructed verdicts.

This decision likewise involves a question of general public interest and importance, that is, whether the defense of conditional or qualified privilege can be relied upon by the defendants in a libel suit when the so-called privilege arose out of an illegal combination or relationship on the part of the defendants.

STATEMENT OF THE CASE.

A statement of the case is set out in that part of the Petition for Writ of Certiorari which pertains to a summary of the matters here involved and such statement is made a part hereof by reference, in order to avoid repetition.

In addition, however, we call the Court's attention to the fact that the evidence plainly shows that the false report made by Associated Aviation Underwriters to Johns' employer, the Superior Oil Company, and which brought about his discharge was based upon the most casual and careless investigation.

That part of the report to the effect that Johns had "poor personal habits and traits" was based upon rank gossip to the effect that Johns was running about with a waitress while married to his former wife (R. 406), and that Johns later divorced his wife. He testified that at the time it was asserted that he, Johns, was going out with a waitress that he had no wife (R. 519). They were divorced in 1931 (R. 519). Under the status of this record his statements should be accepted as true in considering the record with reference to the lower court instructing the verdict against Johns. The report complained of was made about November 5, 1948 (R. 202).

The action of Respondents in wrecking a man's career by a report based upon such innuendo and gossip almost twenty years old was in itself a reckless disregard of the rights of Petitioner. This information obtained from a man named Sherwin was the only investigation Associated Aviation Underwriters made of Johns' personal habits and traits (R. 406-410, incl.).

The witness Herbert, who made the investigation for Associated Aviation Underwriters, stated in his deposition that only two persons were consulted prior to writing the report, a Mr. Moxness and Sherwin (R. 410, 411) and that Associated Aviation Underwriters had no evidence when he (Herbert) wrote and delivered the report of November 5, 1948, of any unwillingness to cooperate or follow the instructions of previous employers, by Johns (R. 409).

Herbert stated that it was his intention in writing the report with reference to Johns to limit his criticism to Johns' lack of flying ability and poor personal habits (R. 408, 409), but the attack on Johns in the report went further.

Consequently it is admitted by the agent who wrote the report that said essential elements of the report with reference to Johns were made without any investigation and without any information of any kind. It is likewise admitted the statement in the report that Johns did not have an Air Transport Rating was false.

No investigations were made by Associated Aviation Underwriters prior to the making of those charges against Johns to determine their truth, although they were essential parts of the adverse criticism of the report which caused his discharge.

We submit this is gross carelessness and complete disregard of Johns' rights as a matter of law.

The exact language criticizing Johns as reflected by the Record (280, 281) in addition stated that Johns had a "poor personality" but Herbert admitted that he had no such information available to him and had made no inquiry as to Johns' personality at the time of his report.

The charges against Johns might be summarized as follows:

(1) Lack of flying ability and background,

(2) Failure to comply with company desires and verbal instructions as to previous employers,

(3) Poor personal habits and traits,

(4) Questionable flying ability,

(5) A former employer lacked confidence in him as a pilot,

(6) Poor personality,

(7) Much better pilot material was available,

(8) That Johns was not qualified to operate aircraft in accordance with the high standards desired by Superior Oil Company (R. 280, 281).

Mr. Herbert who made the report for Associated Aviation Underwriters never talked to Johns and no other agent of the company talked to him prior to the making of the report.

Herbert admitted he had no information with reference to Johns, (1) Johns' background, (2) his personal habits or traits, (3) his failure to comply with company desires and verbal instructions, and (4) that he had a poor personality.

No investigation was made of Johns' record with the Civil Aeronautics Administration which keeps an accurate check or record of all accidents in which a pilot participates and any physical disabilities that he might have, together with much other pertinent information.

At the time of Johns' discharge he had flown approximately 1,250,000 miles (R. 530) and expended more than 8,000 hours in the air (R. 278) without any injury to passengers or cargo and without any serious accident or casualty (R. 530). He was working as a "captain" or first pilot for Superior Oil Company when discharged (R. 278, 279).

The Superior Oil Company circulated the report among its pilots and mechanics (R. 411).

On November 5, 1948, the date of the report, Johns was in New York with a Superior Oil Company plane. He was discharged almost immediately upon his return to California (R. 296).

Up until the time he was discharged no one had made any complaint to him whatsoever concerning his work (R. 282).

Numerous expert witnesses testified that Johns was a highly competent pilot and that he enjoyed an enviable reputation as a pilot prior to said discharge. The testimony shows that Johns was a skilful and competent pilot of long and varied experience.

Johns was ruined. He couldn't get another job anywhere. All his work, effort and training went for nothing.

Johns applied for work with almost all the leading oil companies and oil operators in the Southwest and many more, totaling between 75 and 100 different applications with various companies and persons who would ordinarily have an opening for him and all his applications were refused (R. 520-522).

Petitioner does not ask for the issuance of a writ with reference to the judgment of the Court of Appeals in favor of Superior Oil Company but only with reference to the judgment of that court denying petitioner any relief against Associated Aviation Underwriters and its member companies who were joined as defendants in the lower court.

SPECIFICATION OF ERRORS.

(1) The Court of Appeals erred in refusing to allow Petitioner to either plead or prove the unlawful combination and activities of the various insurance companies who were, in effect, partners in the Associated Aviation Underwriters with reference to aviation insurance and this risk in particular.

(2) The Court of Appeals erred in holding that the defense of qualified privilege could be proved without ref-

erence to the illegal combination or association. In so holding the Court of Appeals held the privilege was absolute rather than conditional or qualified.

(3) The Court of Appeals erred in holding that the agreement of Associated Aviation Underwriters to make examinations and reports (which resulted in the libelous statements concerning Johns) was not an essential part of the unlawful combination when the evidence plainly showed that such agreement out of which the said duty arose was the very basis and foundation of the defense of qualified privilege.

(4) The Court of Appeals erred in holding that appellant could not set up the unlawful combination, although the libel arose directly and was an essential part of the performance, or carrying out, of the design or purpose of said illegal combination.

(5) The Court of Appeals erred in holding that the Petitioner was required to show actual malice, that is personal illwill before he could recover, when the evidence plainly showed that the libelous statements were made wantonly and with gross negligence or indifference as to Petitioner's rights.

(6) The Court of Appeals erred in holding that the evidence as a matter of law did not show gross indifference or negligence on the part of Associated Aviation Underwriters in the making of the libelous statements without any investigation.

(7) The Court of Appeals erred in holding as a matter of law the evidence showed only that Associated Aviation Underwriters had made no sufficient investigation to justify its statements and did not show gross indifference; the question as to whether the negligence or

indifference was ordinary or gross, was a question for the jury.

(8) The Court of Appeals erred in failing and refusing to view the evidence in a light most favorable to the Petitioner.

(9) The Court of Appeals erred in failing to indulge every inference that could be properly drawn from the evidence against the instruction and in favor of Petitioner.

(10) The Court of Appeals erred in holding that as a matter of law under the evidence the Respondent, Associated Aviation Underwriters, was entitled to a judgment.

(11) The Court of Appeals erred in holding that reasonable minds would not differ as to the effect or construction of the evidence presented on the trial.

(12) The Court of Appeals erred in refusing to regard as true all the testimony of Petitioner or Petitioner's witnesses, but on the contrary, the Court of Appeals and the Trial Court acted as a jury and reached conclusions on evidence which should have been submitted to the jury, thereby invading the province of the jury.

(13) The Court of Appeals erred in confusing the statutory defense of "a reasonable and fair comment" by a newspaper concerning a public officer with the defense of qualified or conditional privilege and in its opinion, therefore, erroneously relied upon the decision of *Express Publishing Co.* v. *Wilkins*, 218 S. W. 614.

SUMMARY.

The statement of the case previously set out in this brief and the summary of the matters involved set forth

in the Petition for Writ of Certiorari are made a part of this Summary by reference.

In addition, however, we wish to emphasize the fact that Herbert, who made the investigation and wrote the libelous report, relied entirely upon two telephone conversations *only* for his information concerning Johns, that is, a telephone conversation between Sweetser (also an agent of Associated Aviation Underwriters) in the presence of Herbert with Moxness of Douglas Aircraft Company, and a telephone conversation that Herbert had with Sherwin.

Herbert testified on two different occasions that those two inquiries were the only inquiries or investigations he made concerning Johns prior to the delivery of the report (R. 410, 411). Herbert also testified that Moxness did not say anything with reference to Johns' failure to obey orders (R. 408). Moxness apparently knew nothing about Johns having been divorced.

The termination notice of Douglas Aircraft Company with reference to Johns stated that he left voluntarily (R. 345) to go to another job (R. 346). That statement should have been admitted in evidence in view of Respondents' cross-examination of Johns with reference to his quitting Douglas Aircraft Company (R. 327).

Herbert secured his information as to Johns' personal habits and traits from Sherwin, who stated over the telephone to Herbert that Johns, while married to his former wife, was running around with a waitress, and eventually divorced his wife (R. 406). That divorce was obtained in 1931, which indicated that Associated Aviation Underwriters was not averse libeling a pilot on stale information some 20 years old.

ARGUMENT.

I.

FIRST POINT.

The defense of qualified privilege or libel action cannot be based on a duty or interest which arises from an unlawful combination. Such duty must be a lawful obligation.

SECOND POINT.

The duty of Associated Aviation Underwriters to make inspections and reports was an essential element or part of the unlawful plan or combination whereby 61 insurance companies combined together to handle aviation insurance in the United States.

THIRD POINT.

A partnership of corporations is unlawful and opposed to public policy particularly where all the partners or corporations were engaged in the insurance business which is fraught with public interest.

The insurance business is quasi-public in its nature (34 Tex. Jur. 1321) and subject to regulation and control by the state. *Daniel* v. *Tyrrell & Garth Inv. Co.*, 126 Tex. 213, 93 S. W. 2d 372.

As we have pointed out elsewhere, Associated Aviation Underwriters is a legal entity in that it can sue and be sued, has officers, agency employees and maintained business offices in New York, Atlanta, Chicago, Dallas, Los Angeles, Kansas City and San Francisco (R. 486, 451).

Associated Aviation Underwriters did not maintain any agent for service of process in Texas (R. 496) but it either did an insurance business in Texas or was an intermeddler. Through it various companies which were members of Associated Aviation Underwriters did business unlawfully in Texas. The premiums paid by Superior Oil Company for the policies here involved were allocated among thirty-two of the various member companies (R. 204).

The stipulation filed in this case states that the risk covered by the policies here involved was assumed in agreed proportions by certain insurance companies (including those insurance companies named as defendants in this suit) in accordance with the terms of two agreements entered into in New York, July 1, 1940 (R. 204).

Petitioner was not allowed to prove the terms of said two agreements referred to in the stipulation.

Obviously from this testimony and the further testimony of Mr. Walter the premium was divided, as was the risk, among the following companies, viz.:

> "The Alliance Insurance Company, Ltd., American Eagle Fire Insurance Company, American Insurance Company, Bankers Indemnity Insurance Company, Commercial Union Assurance Company, Ltd., Continental Insurance Company, Columbia Casualty Company, Federal Insurance Company, Fidelity Phoenix Fire Insurance Company, Firemens Fund Insurance Company, Firemens Insurance Company of Newark, New Jersey, Fidelity & Casualty Company of New York, Firemens Fund Indemnity Company, Glen Falls Insurance Company, Great American Insurance Company of New York, General Accident Fire and Life Assurance Corporation, Ltd., Glen Falls Indemnity Company, Great American Indemnity Company, New York, Hanover Fire Insurance Company, London

Assurance Marine, London & Life Insurance Company, Ltd., London and Life Indemnity Company of America, Marine Insurance Company, Ltd., Merchants Fire Assurance Corporation, Merchants Indemnity Corporation of New York, Metropolitan Casualty Insurance Company of New York, National Fire Insurance Company of Hartford, Ocean Accident & Guaranty Corporation, Ltd., Sea Insurance Company, Ltd., United National Indemnity Company, United States Guaranty Company, Vigilant Insurance Company" (R. 458, 459).

In other words, these thirty-two companies were partners, sharing the losses and reaping the profits from this particular piece of partnership business.

An examination of the policies here involved which were sent up to the Court of Appeals as original exhibits (R. 309) will show that the Associated Aviation Underwriters was engaged in an insurance business, although Firemens Fund Indemnity Company and Firemens Fund Insurance Company are named as insurers.

Said policies fully display the name of Associated Aviation Underwriters and in substance state that the policies are not valid until approved by Associated Aviation Underwriters. The district court ordered said policies, that is, Hull policy No. AH3-3333 and Liability Policy No. AL3-2245 sent up as original exhibits (R. 547).

It has always been the law in Texas that a corporation has no right to enter into a partnership with another corporation, 10 Tex. Jur. 385, and the large number of Texas cases cited thereunder. This is the general rule and the federal courts have uniformly almost followed the laws of the separate states.

The anti-trust laws of Texas, particularly Article 7426, Secs. 2, 3, 4, and 5, R. S., 1925, prohibit any agreement

between two or more insurance companies doing business in Texas which necessarily and naturally tend to fix, maintain, affect, increase, reduce, establish or control the cost of insurance and applies even though the cost of insurance is only incidentally affected.

Those particular provisions of said article are set out in the appendix to this brief.

The text above mentioned, 24 Tex. Jur. 853, has the following comments with reference to the Texas Anti-Trust Law applying to insurance companies, viz.:

> "The Anti-Trust Law, Article 7426, Sections 2, 4, 5, Revised Statutes of 1925, 'simply prohibits any agreement between two or more insurance companies doing business in this state, which necessarily and naturally tends to fix, maintain, affect, increase, reduce, establish or control the cost of insurance,' and it applies even though the cost of insurance is only incidentally affected. 'If it affects in any manner the cost of insurance, it is prohibited by the statute.' Thus an agreement between insurance corporations to limit their agents' commissions to a certain percentage and not to do business through an agent who accepts more than that commission from any company on fire insurance business written in the state, 'necessarily and naturally tends to fix, maintain, affect, increase, or reduce the cost of insurance and * * * to fix and maintain a standard or figure whereby the cost of insurance is affected, established and controlled,' and violates Article 7426, Sections 2, 4, 5, Revised Statutes of 1925 (Anti-Trust Law). 'That a contract necessarily and naturally tends to so fix, etc., the costs of insurance is the test * * * to be applied.' Furthermore, such an agreement 'not only prevents or lessens competition in the business of insurance as is inhibited by Section 3 of Article 7426 (Revised Statutes of 1925), but also violates that portion of Section 5 of the Article, which reads: 'To make, enter into, maintain exe-

> cute or carry out any contract * * * between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in the * * * business of * * * insurance.' Nor can the agreement be saved from invalidity on the ground that it is only reasonably and not unreasonably in restraint of trade" (pp. 853, 854).

Certainly it cannot be seriously contended by these member companies that these agreements creating Associated Aviation Underwriters did not lessen competition. They effectively and finally destroyed competition and any such combination or arrangements between insurance companies is *prima facie* invalid and illegal under the laws of Texas. All these thirty-two corporations were doing business in Texas except some four companies, Allied Insurance Company, Ltd., Marine Insurance Company, Ltd., Vigilant Insurance Company and Merchants Indemnity Company of New York (R. 461). In other words, all the thirty-two companies who participated in the Superior Oil Company's aviation premiums, except said four, were authorized to do business in Texas and subject to its laws. We contend the sixty-one companies were unlawfully doing business in Texas under this arrangement. The agreements which created Associated Aviation Underwriters automatically violated the Anti-Trust Laws of Texas, as is indicated by the above quotation.

Article 4686 of the Revised Civil Statutes of Texas, which was in effect prior to 1951, when this case was tried and the agreements under consideration were made, reads as follows:

> "No individual, group of individuals, association or corporation, unless now or hereafter otherwise permitted by statute, shall be permitted to engage in the business of insuring others against those losses which may be insured against under the laws of this state."

The above article was repealed in 1951 when the Texas Insurance Code was enacted but an almost identical article (Article 3.57, Texas Insurance Code) was enacted and that article is set forth in the appendix to this brief. In other words, said statute has been in effect during all the times mentioned hereon.

Associated Aviation Underwriters had no permit to do business in Texas (R. 466, 467) although it maintained one of its principal offices at Dallas.

In our brief filed with the Court of Appeals we cited the case of *United States* v. *Southeastern Underwriters Ass'n*, 64 S. Ct. 1162, 322 U. S. 533, which held in effect that insurance may be interstate commerce and is subject to the federal regulatory and criminal statutes.

After that decision Congress passed the Act of March 9, 1945 (15 U. S. C. A., Ch. 20), regulating insurance. It particularly provides in Sec. 1012, Tit. 15, U. S. C. A., that after June 30, 1948, the Sherman Act, the Clayton Act, and the Federal Trade Commission Act should be applicable to the business of insurance (See Appendix).

At the time Johns was employed and at the time he was fired in November, 1948, the said regulatory acts, that is, the Sherman Act, the Clayton Act and the Federal Trade Commission Act, applied to this combination.

Section 1, Title 15, U. S. C. A., which is part of the Sherman Anti-Trust Act, provides that every combination in restraint of trade or commerce among the several states is declared illegal.

Section 2 of said Title and Act provides that every monopoly or attempt to monopolize or combination or conspiracy to monopolize any part of the trade or commerce is a violation of that statute and, as stated, this rule ap-

plies to insurance. Section 3 of said Title and Act refers particularly to the District of Columbia.

Associated Aviation Underwriters does business in the 48 states and the District of Columbia (R. 442).

It becomes pertinent, therefore, to ascertain how and why Associated Aviation Underwriters made this report which libeled Johns. If there was no duty involved or obligation of any kind then Associated Aviation Underwriters was a rank interloper or meddler interfering in the contractual relationship of Johns and Superior Oil Company.

If on the other hand the report was part of the service that Associated Aviation Underwriters regularly furnished as a part and parcel of the agreement existing between the association of said insurance companies and Superior Oil Company then certainly that agreement to make that report and the making of the report itself was pursuant to the illegal plan or combination which we complain of.

We submit that under the unlawful combination that the Associated Aviation Underwriters, either at its own initiation or at the request of any insured, customarily makes inspections and reports on the aviation departments and aviation employees of any risk the making of this report was an essential part of its job. It was one of the obligations assumed and which Associated Aviation Underwriters agreed to perform as part of the unlawful combination (R. 383, 416, 417). Obviously it was one of the main selling points of writing aviation insurance through Associated Aviation Underwriters.

There could be no qualified privilege unless there was a corresponding duty, that is, a lawful obligation arising out of a lawful relationship.

The Court of Appeals in its opinion in this case states:

> "A communication made in good faith on any subject in which the person reporting has an interest and with reference to which he has a duty, is conditionally or qualifiedly privileged if made to a person having a corresponding interest or duty."

We wish to interpolate or add to that statement, if no investigation (or a grossly careless investigation) was made as a basis for the statement there is no good faith, and also both the interest and the duty must be *lawful.* The person reporting must have a lawful interest or a lawful duty.

In this particular instance the only interest that Associated Aviation Underwriters had, arose from the unlawful combination. Associated Aviation Underwriters, although engaged in the business of writing insurance in our opinion, nevertheless was not an insurer in the ordinary sense.

Apparently the policies were not valid unless Associated Aviation Underwriters approved same but the making of inspections and reports was a part and parcel of the unlawful arrangement whereby these various insurance companies controlled aviation insurance and divided up the proceeds therefrom.

The only reason that Associated Aviation Underwriters was making an inspection and report was because sixty-one companies (the Respondents say 32) had an interest in perpetuating their unlawful combination. It is absolutely impossible to separate the functions of an investigation and reporting from the combination. They are all part of the same warp and woof of the scheme which we contend was unlawful. We should be allowed to prove it.

The nature of what Associated Aviation Underwriters did might be clarified and summed up by an examination of Herbert's testimony who stated that his primary job as an employee of Associated Aviation Underwriters in the Dallas office was the engineering of aviation risks, that is, insurance risks, and he filled that in with a minor amount of underwriting and routine insurance office work.

He testified that the Dallas office out of which he worked had about ten employees and a claim man who handled claims for the Associated Aviation Underwriters, and that the solicitors of insurance were not known as solicitors but on the contrary, that when the Dallas office makes an inspection of a risk, ordinarily an agent has submitted it to that office. He stated that office handled the four southwestern states, Arkansas, Oklahoma, Texas, and Louisiana (R. 378, 379).

After the risk is submitted by an agent ordinarily Associated Aviation Underwriters makes a physical inspection, and Associated Aviation Underwriters has the agent fill in an application for insurance coverage.

Associated Aviation Underwriters makes out a policy order form which is in the nature of an application. It is signed by the applicant and given to one of the girls in the Dallas office who "types up the contract" (R. 381). He states those forms are issued in the name of one of the 60 or 61 companies that Associated Aviation Underwriters acts for (R. 382).

The particular wire or telegram which initiated the inspection of the Superior Oil Company's aviation department is set forth on page 387 in the Record and was sent by Sweetser, the West Coast representative of Associated Aviation Underwriters to Mr. William Walter, manager of Associated Aviation Underwriters at Dallas, requesting

that Herbert be directed to proceed to Los Angeles to conduct the inspection.

Herbert did not meet Johns at that time, that is, while he made that inspection (R. 390), and he made no investigation of Johns at that time (R. 390), excepting the investigation he later testified about with reference to the two telephone calls.

Herbert testified that it was the custom and practice on an account of the size of Superior Oil Company to make an inspection every year, whether there was an accident or not, but that he thought that an accident the Superior Oil Company had in Rome was probably the motivating factor for this particular inspection (R. 415, 416).

Herbert also testified that Associated Aviation Underwriters made almost all of its inspections more or less of a routine nature, and for some airlines that they made them twice a year (R. 417).

It is obvious that these inspections and reports were expensive and time consuming and were an essential part of a combination which was entered into for the purpose of controlling a very large amount of insurance business and fixing the price therefor.

As stated elsewhere in this brief, the method and manner of distribution of the profits from the combination is reflected by two agreements made in New York in July, 1940, or about that time which we inquired about but were not allowed to go into (R. 240).

As stated in 53 C. J. S. 147, viz.:

> "In order to be privileged the communication must be by, and to, one who has a right, duty, or interest in the subject. If there is no duty to perform or no interest the communication is not privileged,

however, the communication may be privileged by reason of either interest or duty" (p. 147).

Furthermore, the general rule is that mere belief in the existence of the duty or interest is not sufficient as is stated in 53 C. J. S. 149, viz.:

> "The duty or interest on which the privilege is founded must actually exist; the privilege depends, not on what the individual may have supposed to be his interest or duty, but on what the court decides, as a matter of law, his interest or duty to have been" (p. 149).

It is incumbent upon us, therefore, to consider the nature of the duty, whether it is a lawful duty or a valid interest or whether an illegal duty or an unlawful interest which amounts to no duty or interest at all.

It is stated in 36 C. J. 1238 that:

> "The principle upon which privileged communication rests is that of public policy and peculiarly so in the case of absolute privilege" (p. 1238).

As we shall hereinafter point out it is also the public policy of the United States and of Texas not to enforce or recognize in any way duties or obligations arising out of combinations in violation of the various Anti-Trust and other penal statutes of said jurisdictions. See also 53 C. J. S. 139.

The rule is also stated in 53 C. J. S. 140 that:

> "A privileged communication, which in the law of libel is generally synonymous with, and regarded as the same as, a privileged publication, is one made *bona fide* by a person who has an interest in the subject matter to one who also has an interest in it or stands in such a relation that it is a reasonable duty, or is proper, for the writer to give the information.

> Such communications are often divided into two classes: Absolute privilege; and conditional or qualified privilege. They are distinguishable from privileged comment or criticism" (p. 140).

We submit that under the facts in this case the occasion was not privileged, and Associated Aviation Underwriters was not a privileged person, and that Superior Oil Company was not within the privilege.

Respondents claim that Associated Aviation Underwriters was not an insurer but on the contrary that the insurers were the companies named in the particular policy. If that is correct then certainly no privilege could exist because there would be neither privileged occasion nor would Associated Aviation Underwriters be a privileged person.

The definition of a privileged occasion is set forth in 53 C. J. S. 142 as follows:

> "A privileged occasion is an occasion when for the public good and in the interests of society one is freed from liability that would otherwise be imposed on him by reason of the publication of defamatory matter; one on which a privileged person is entitled to do something which no one not within the privilege is entitled to do on that occasion; and it has been said that it is not the publication itself, but the occasion of its publication, that is privileged" (pp. 142, 143).

In this instance, therefore, you have a clash of different interests of society. Will society be better served by large illegal combinations delivering false and libelous matter to the beneficiaries of that combination, or by making it responsible for its false statements which destroyed the livelihood of an individual?

Associated Aviation Underwriters had no permit to carry on an insurance business in Texas (R. 467) and yet

the Respondents contend that it was the aviation department of sixty-one companies.

If Associated Aviation Underwriters is an entity, and if it exists as an association, then each and all of the insurance companies that are members thereof are doing business through the association in Texas in violation of the state laws because many of them apparently had no permits to do business in Texas as insurance companies. Respondents admit that four out of the 32 companies that divided up this particular risk had no such permits and we are prepared to show that other member companies had no such permits but we were not allowed to do so.

We submit that we should be allowed to prepare our case properly for trial so that the true situation with reference to this association could be shown to the trial court.

II.

FOURTH POINT.

The obligation or duty to make inspections and the making of the report which libeled Johns not only involved but depended on the unlawful combination of insurance companies and consequently said unlawful combination in violation of numerous statutes, both state and federal, may be urged in opposition to a claim of qualified privilege which is a legal defense based upon a lawful situation.

In its opinion the Court of Appeals relied upon such decisions as *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

The cases following the line of the Connolly case involved suits upon contracts which were collateral to and independent of an unlawful combination. They lay down the general rule that where the obligation does not depend on the unlawful combination but is based on a collateral

and entirely independent contract that a recovery may be had thereon. 58 C. J. S. 1109.

The obligation in this case, however, to make the investigation and report was not an independent contract. It was a part and parcel of the main scheme or combination. It was one of the obligations that Associated Aviation Underwriters was created to perform. It was an essential part of the illegal agreement under which these insurance companies attempted to completely control almost fifty per cent of the aviation insurance of the United States.

With reference to such obligations the following rule set out in 58 C. J. S. 1108 applies, viz.:

> "If a suit is brought by a combination or a member thereof against one not a member, for the breach of some agreement, the performance of which was an essential part of the unlawful scheme of the combination, this fact may be shown as a defense to the suit; and in conformity with this rule it has been held that a party sued on a contract in a state court may interpose the defense that the contract violates the federal anti-trust laws. Thus it has been held that the defense of illegality of the combination may be set up by one who has purchased from it goods in pursuance of an agreement that was an essential part of the scheme of the unlawful combination" (p. 1108).

One of the leading cases on this question is *Sola Electric Co.* v. *Jefferson Electric Co.*, 63 S. Ct. 172, 317 U. S. 173, 87 L. Ed. 165. That case held that the illegality of a contract made in violation of the Sherman Act could be urged as a defense.

It cites the decision of *E. Bement & Sons* v. *National Harrow Co.*, 186 U. S. 70, 22 S. Ct. 747, 46 L. Ed. 1058, in support of said holding. That decision lays down the rule as follows:

> "As the statute makes the contract in itself illegal, no recovery can be had upon it when the defense of illegality is shown to the court. The act provides for the prevention of violations thereof, and makes it the duty of the several district attorneys, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations, and it gives to any person injured in his business or property the right to sue; but that does not prevent a private individual when sued upon a contract which is void as in violation of the act from setting it up as a defense, and we think when proved it is a valid defense to any claim made under a contract thus denounced as illegal" (22 S. Ct. 754).

The same doctrine should apply here and the same reasoning, that is that when an action is brought for damages on a libel made in the course of carrying out the illegal agreement and combination the defendant should not be allowed to interpose as a defense that it was qualifiedly privileged to make the libel which grew out of the wrongful and unlawful duty the defendant was performing at the time it committed the libel.

In short, the defense of qualified privilege is a lawful defense and can only exist when the duty or obligation or interest, or all of them, are lawful and legitimate.

We further submit the following quotation from *Continental Wallpaper Co.* v. *Voight & Sons Co.*, 212 U. S. 227, 29 S. Ct. 280, 53 L. Ed. 684, where the court said:

> "The adjudged cases all hold that, upon the question whether the particular contract sought to be enforced arises out of an illegal transaction, the court will not be restricted to a partial statement of the facts, but will consider all the circumstances connected with the transaction, so as to ascertain its real nature. In *Addyston Pile & Steel Co.* v. *United States*, 175 U. S. 211, 245, 44 L. Ed. 136, 149, 20 Sup. Ct.

Rep. 96, 109, the court said that 'all the facts and circumstances are, however, to be considered in order to determine the fundamental question, whether the necessary effect of the combination is to restrain interstate commerce.'

"Upon the whole case, and without further citation of authorities, we adjudge, upon the admitted facts, that the combination represented by the plaintiff in this case was illegal under the anti-trust act of 1890; that it is to be taken as one intended, and which will have the effect, directly to restrain and monopolize trade and commerce among the several states and with foreign states; and that the plaintiff cannot have a judgment for the amount of the account sued on, because, for the reasons we have stated, such a judgment would, in effect, aid the execution of the agreements which constituted that illegal combination. We consequently hold that the circuit court of appeals properly sustained the third defense, and rightly dismissed the suit. Its judgment must be affirmed" (29 S. Ct. 294).

Even with reference to cases involving absolute privilege, in connection with communications from a client to an attorney about a crime or fraud to be committed, same are held not privileged. *United States* v. *Bob*, 106 F. 2d 37, cert. den. 308 U. S. 589.

The right to plead any relevant defense has been set forth even more explicitly in the present rules of civil procedure as is indicated by the decision of *Brown Paper Mill Co.* v. *Agar Mfg. Corp.*, 1 F. R. D. 579, which discusses the effect of Rule 13 on pleading counter-claims that set up the Federal Anti-Trust Laws. As is pointed out in that decision, the jurisdiction of the federal court is not extended by such rule because federal courts are the only forums which have jurisdiction of violation of such laws. That decision goes on to state that Rule 13b was enacted

for the purpose of dispensing with needless independent actions.

We can see nothing that can be gained by forcing Johns to file an independent suit involving the violation of those federal acts by Associated Aviation Underwriters.

III.

FIFTH POINT.

Proof of gross negligence or indifference in publishing a libelous statement will destroy the defense of qualified privilege and in proving gross negligence it is not necessary to prove hatred, ill will, anger, wrath or vindictiveness but only such carelessness or indifference as is the antithesis of good faith.

SIXTH POINT.

The question of whether the libelous statement was made with gross carelessness or indifference or only lack of ordinary care is a jury question and the court erred in not submitting that question to the jury.

SEVENTH POINT.

In instructing a verdict against petitioner the trial court erred in (1) failing to view the evidence in the light most favorable to the petitioner and also in refusing to indulge against the instruction, every inference that might properly be drawn from the evidence, (2) holding that reasonable minds could not differ as to the effect or construction of the evidence which the court erroneously concluded required a judgment for the respondents and (3) refusing to regard as true all the evidence offered in behalf of petitioner but on the contrary, the court weighed the evidence and substituted its conclusions for the conclusions of the jury and thereby invaded the province of the jury.

We discussed these three points in our brief filed with the Court of Appeals which held that under the decision

of *International & G. N. R. Co.* v. *Edmundson,* 222 S. W. 181, the petitioner was required to show that the libelous statement was actuated by some sinister or corrupt motive, or motives of personal spite or ill will, that is by actual malice, otherwise he could not recover.

In so holding the Court of Appeals wholly ignored many recent cases of the appellate courts of Texas to the effect that it is not necessary to show personal spite, or ill will, but on the contrary, gross carelessness or indifference is sufficient to destroy the defense of qualified privilege.

The Edmundson case was decided in 1920. Some six years later the Court of Civil Appeals in *Carruth* v. *Dallas Gas Co.,* 282 S. W. 334, laid down the rule as follows:

> "In other words, where there is no question of privilege, a *prima facie* case of slander is made out by proving the injurious words, for the law then implies the necessary element of malice; but, when such words are spoken on a privileged occasion, a *prima facie* case of slander can only be made out by the additional proof that the spoken words were uttered through express malice. The term 'malice,' when used in this sense, 'does not import necessarily hatred, ill will, anger, wrath, or vindictiveness, but need be no more than the antithesis of good faith.' *Cobb* v. *Garlington,* (Tex. Civ. App.) 193 S. W. 463" (p. 339).

This holding construed the doctrine announced in the Edmundson case and in so far as we can ascertain it has never been s :t aside by any appellate decision of this state.

Another case relied upon by the Court of Appeals is *Fitzjarrald* v. *Panhandle Publishing Co.,* 228 S. W. 2d 499, which we submit was a libel suit against a newspaper and involved the proposition of whether or not the publication was a "fair comment" and a proper criticism of a

public officer under the statute. The real question in that case as we see it was whether or not the false statement was one of fact, or whether it was a fair and reasonable comment, and the duty of the court under the statute with reference to finding privilege has no relevancy here, and is immaterial.

The law of libel is fully covered by Article 5430 of the Revised Civil Statutes of Texas of 1925, which states in effect that a libel is a writing tending to injure one's reputation and thereby expose him to financial injury (See appendix).

The Supreme Court of Texas construed that statute in *Guisti* v. *Galveston Tribune*, 105 Tex. 497, 150 S. W. 874, holding that it was the intention of the legislature to materially modify the doctrine of the common law with reference to libel. That court in that decision held in part as follows:

> "We think it clear that, in the enactment of the law, the purpose was not only to make definite what constitutes actionable libel in this state, but to materially modify the doctrine of the common law upon that subject.
>
> "By the terms of the present law, a libelous publication, contrary to the common law rule, becomes actionable without the proof of malice, whether it is or is not libelous *per se*.
>
> "Under the present law, it is not necessary to the right to maintain an action for a publication not libelous *per se* to allege or prove special damages. *Walker* v. *San Antonio Light Pub. Co.*, 30 Tex. Civ. App. 165, 70 S. W. 557. In this particular the common law rule has been modified.
>
> "Again, at common law, where the libel was not actionable *per se*, damage for mental anguish was recoverable, if at all, only when proof had been made of other injury or damage, but the contrary is the rule

under the present law. So that we are constrained to hold with Judge Key, as in the case of *Walker* v. *San Antonio Light Publishing Co.*, above cited, that the manifest purpose of the Legislature in enacting this law was to cover the entire subject of libel as applied to civil actions, without regard to the rules of the common law and holdings of the courts on the subject, and to materially enlarge the rights of those who may be the subject of libelous publications" (p. 877).

We quoted further from that decision on page 51 of our brief filed in the Court of Appeals to the effect that it is immaterial that the publication complained of is not libelous *per se* if the publication is of such character as tends to injure the reputation of the plaintiff and expose him to public hatred, contempt or ridicule or tends to impeach his honesty, integrity, virtue or reputation.

Certainly this publication tended to impeach Johns' reputation as a pilot and otherwise, and the rule has long been, as set forth in 27 Tex. Jur. 603, that:

> "Words which affect a person injuriously in his occupation are actionable *per se* though they do not impute the commission of any crime."

In a comparatively recent case, *Bell Publishing Co.* v. *Garrett Engineering Co.*, 141 Tex. 51, 170 S. W. 2d 197, the Supreme Court of Texas decision is fairly well stated in the following headnote, viz.:

> "False words, spoken or written, which injuriously affect person spoken of in his profession by imputing to him a want of professional capacity so that as a necessary, natural, or proximate consequence such person is prevented from deriving a pecuniary reward which probably he might have otherwise obtained, are actionable *per se*, without proof of special damages" (p. 197).

Certainly the publication under consideration here destroyed Johns' reputation as a pilot and cost him his job. Such a statement would obviously be within the confines of the above holding.

In *Houston Chronicle Publishing Co.* v. *Wegner,* 182 S. W. 45 w. e. ref., the court made the following holding:

> "We have already shown that the article complained of was published upon the written communication of appellant's Galveston correspondent without any reasonable inquiry as to the truth of such communication, and that, had such inquiry been made, the falsity of the same would have been disclosed. We therefore conclude that said publication was recklessly made without legal justification or excuse, and in a spirit of wanton disregard of the rights of E. Wegner, Sr., and that from such publication malice may be inferred. *Cotulla* v. *Kerr,* 74 Tex. 90, 95, 11 S. W. 1058, 15 Am. St. Rep., 819; *Forke* v. *Homann,* 14 Tex. Civ. App. 670, 39 S. W. 213; *Mayo* v. *Goldman,* 57 Tex. Civ. App. 475, 122 S. W. 449; *Ellis* v. *Garrison,* 174 S. W. 964; *Houston Chronicle Co.* v. *McDavid,* 157 S. W. 224; *Reid* v. *Publishing Co.,* 158 Ky. 727, 166 S. W. 245.
>
> "In *Courier Journal Co.,* 104 Ky. 335, 47 S. W. 229, the court said:
>
> " 'If, as a matter of fact, the words published were false, and tended to the injury of plaintiff, and were published recklessly, even without special ill will, defendant is equally guilty, and punitive damages may be recovered' " (p. 49).

In *Houston Chronicle Publishing Co.* v. *Bowen,* 182 S. W. 61, the Court of Civil Appeals also held as follows:

> "It may be conceded that there was no ill will, animosity, or hatred entertained by the defendant or its officers toward the plaintiff, and that in that sense there was no express malice shown by the evidence. But in a case of libel it is not required that malice be

> shown by proof of ill will, animosity, or hatred, nor is it essential to show a willful or wanton act or gross indifference or an act done with the specific intention to injure the person that was injured; but malice may be inferred from the fact that the act complained of was done with such utter recklessness as to indicate a disregard of the consequences. *Houston Chronicle Pub. Co.* v. *McDavid,* 173 S. W. 470; *Fessinger* v. *El Paso Times Co.,* 154 S. W. 1175; *Cotualla* v. *Kerr,* 74 Tex. 95, 11 S. W. 1058, 15 Am. St. Rep. 819; *King* v. *Sassaman,* 54 S. W. 304" (p. 65).

In *Evans* v. *McKay,* 212 S. W. 680, the court held:

> "In cases founded on libelous publication the jury 'may infer the existence of malice from absence of probable cause for making the publication, or upon evidence of express malice.' *Cotulla* v. *Kerr,* 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819" (p. 685).

That suit involved an action for damages based upon the claim that the defendant caused the plaintiff's discharge by the railroad because of certain false and malicious statements made to plaintiff's employer.

Ordinarily the question of the degree of the carelessness, negligence or indifference is left to the jury. Of course, if there was no evidence whatsoever, not even an scintilla, in support of petitioner's contention that Associated Aviation Underwriters exhibited a gross and careless indifference to his rights then an instructed verdict would be proper but that situation does not exist.

We challenge any one to review this evidence and then state that it would not be possible for a reasonable mind to conclude from the evidence that Associated Aviation Underwriters had been grossly negligent in the investigation prior to the report and in making the report concerning Johns.

On page 71 of petitioner's brief filed in the Court of Appeals we quoted at length from a decision by the Supreme Court of Texas, *White* v. *White*, 172 S. W. 2d 295, in which the court summarized the rules applicable to a consideration of evidence in connection with the granting of an instructed verdict, citing various Texas cases to support different parts of that summary.

The uncertainty of Herbert, who wrote the report, as to what he meant is shown by the following examination:

> "Q. I am talking about the three things you mention in the first paragraph, paragraph 'A,' you say 'failure to comply with company desires and verbal instructions.'
>
> "A. This doesn't pertain to Mr. Johns.
>
> "Q. In other words, the three things mentioned in the first paragraph don't pertain to Mr. Johns?
>
> "A. No, sir.
>
> "Q. Which one of them does it pertain to?
>
> "A. I will just read it. I don't know whether you want to put it in the record or not. This is under 'Operations.' This is an evaluation of the operation problem * * *" (R. 400, 401).

Mr. Herbert then read his report. At first he disclaimed any intention to refer to Johns, although the succeeding paragraph begins with the words: "An indication of this is in the case of Carroll Lee Johns who was hired as a relief pilot" (R. 401).

No one could read the vascillating and uncertain testimony of Herbert without concluding that he had not investigated the facts and that he practically admitted it.

The rule is stated by the Commission of Appeals (which was then a part of the Supreme Court of Texas) in *Thomas* v. *Postal Telegraph-Cable Co.*, 65 S. W. 2d 282, as follows:

"Since the verdict was instructed in the district court for the defendant companies, we must view the evidence in its most favorable light for the Thomases. If there is any evidence in the record of probative force which would justify a finding in favor of the Thomases, the judgments of the two lower courts should be reversed and the cause remanded to the district court for a new trial. It therefore becomes necessary for us to review the facts" (p. 282).

The district court in Houston refused to follow this rule but substituted its judgment in lieu of the jury's verdict. The Court of Appeals for the Fifth Circuit has long recognized this rule of decision, as is indicated by its holding in *Ford* v. *Southwestern Greyhound Lines*, 180 F. 2d 934, where the court said:

"The test which governs in reviewing a directed verdict is well settled. The evidence must be viewed in the light most favorable to the losing party. Every inference that may properly be drawn from the evidence must be indulged against the instruction. If the record reflects any substantial testimony of probative force in favor of the losing party, same forbids a directed verdict. A peremptory charge is warranted only when the evidence is such that no other reasonable verdict can be rendered and the winning party is entitled, as a matter of law, to a judgment" (p. 935).

That decision cited also the case of *White* v. *White*, 141 Tex. 328, 172 S. W. 2d 295, which we have referred to.

In a comparatively recent decision, *LeMaster* v. *Fort Worth Transit Co.*, 138 Tex. 512, 160 S. W. 2d 224, the Supreme Court stated the rule as follows:

"The rule is that, if the evidence is conflicting, the jury must decide the conflict; and if the evidence is not conflicting, but reasonable minds might differ as to its effect, still a fact issue is presented" (p. 226).

Certainly with reference to this libel against Johns reasonable minds might differ not only on the evidence but as to its effect and also as to the inferences which might be drawn from the evidence and therefore this case presented a jury issue. Johns was arbitrarily denied a jury trial.

In *Stevens* v. *Karr*, 119 Tex. 479, 33 S. W. 2d 725, the Supreme Court of Texas laid down the rule as follows:

> "In passing upon the question involving the right of the trial court to instruct a verdict, as was done in this case, the evidence must be considered most favorably in favor of the plaintiff and a peremptory instruction is warranted only when the evidence is such that no other verdict could have been rendered and that the defendants were entitled, as a matter of law, to a judgment. If there is any conflicting evidence, either direct or circumstantial, in the record of a probative nature, the case is for the jury" (pp. 728, 729).

The Court of Appeals for the Fifth Circuit reached substantially the same conclusion in *Ballard* v. *Atchison, T. & S. F. Ry. Co.*, 100 F. 2d 162.

Ordinarily degrees of negligence are for the jury to decide. Whether the negligence was gross or ordinary is a fact question to be submitted to the jury.

In *Morton Salt Co.* v. *Wells*, 35 S. W. 2d 454, the court had this to say with reference to gross negligence, indicating that it was a fact issue as to whether or not the negligence was gross or ordinary which would require submission to the jury, the court saying:

> " 'Gross negligence' is a relative term and means greater want of care than is implied by the term 'ordinary negligence' but the particular facts and circumstances of each case must be taken into consideration, for what might prove to be simply ordinary negligence

under one set of circumstances and conditions might constitute gross negligence under other circumstances and conditions, so, at last, in each case the question is one of fact" (p. 458).

The Court of Appeals for the Seventh Circuit in *Nattens* v. *Grolier Society*, 195 F. 2d 449, lays down the rule as follows:

> " 'Whether the negligent conduct of a defendant, which has resulted in injury to another, amounted to wantonness, is a question of fact to be determined by the jury, if there is any evidence in the record fairly tending to show such a gross want of care as indicates a willful disregard of consequences or a willingness to inflict injury' " (p. 451).

The decision in *Copp* v. *Van Hise*, 119 F. 2d 691, by the Court of Appeals for the Ninth Circuit is to the same effect.

The Court of Appeals for the Fifth Circuit in the instant case found, in effect, that Associated Aviation Underwriters was guilty of failure to use ordinary care in the investigation but that the evidence was not sufficient to submit the issue of gross negligence or indifference. The court said in its opinion:

> "We think that a jury might very well have found that there was no sufficient investigation to justify the statements against appellant."

We submit that we have set forth in other parts of this brief references to the record which show that as to many of the charges against Johns there was no prior investigation made at all.

The report charged that Johns came from a poor background when no investigation was made of his background.

It was only after the suit was filed that his record was combed from birth up to the time of trial.

The report charged that he had poor personal habits and traits, yet the only basis for this statement, if it could be considered a basis, was the charge that *twenty years past* he had gone with a waitress before he was divorced. The facts were, that he was divorced at the time he went with the waitress.

The report charged that Johns failed to comply with company desires and verbal instructions, of which there was no evidence at the time of the report and no inquiries made.

The charge was made that he had a poor personality but there was no evidence to support such a statement and no attempt was made to talk to Johns.

The charge was made that Johns was not qualified to operate aircraft in accordance with the high standards desired by Superior Oil Company for which there was no basis whatsoever, except the two telephone conversations, one with Sherwin who had not seen Johns or had any contact with him for many years since Johns taught him to fly back in the 1930's at the Pacific Aeronautical College in Los Angeles (R. 395). Sherwin stated to Herbert that he had not known Johns since 1938, ten years prior to the report (R. 395). In other words, Sherwin had had no contact with Johns for more than ten years of any kind and so told Herbert in their telephone conversation. The gossip he repeated was twenty years old (R. 395).

Furthermore, with reference to Johns' failure to obey orders or to comply with company desires or verbal instructions Herbert admitted that Moxness didn't have anything to say about that as is indicated by the following question and answer:

"Q. What, if anything, did Mr. Moxness tell Mr. Sweetser, if you recall, with reference to Mr. Johns' failure to obey orders? I believe you express it in subdivision 2-A as 'Failure to comply with company desires and verbal instructions.' Did Mr. Moxness have anything to say about that?

"A. No, this all pertains to the Superior Oil Company. I don't think Mr. Moxness knows anything about it, 'offhand' " (R. 408, 409).

As we have previously stated, a full report could have been obtained with reference to Johns from the Civil Aeronautics Administration but none was sought. The evidence showed that the CAA kept a complete record as to accidents, etc., on every pilot from student pilot to Airline Transport Rating (R. 364).

The charge was made that he did not have an Airline Transport Rating (which is the highest rating a pilot can procure) and the evidence showed that Johns had such a rating at the time of the report and for more than five years prior thereto. This was just a baldfaced misstatement of fact damaging to Johns, about which no investigation of any kind was made.

We submit there was the grossest indifference to Johns' rights and gross carelessness and negligence in the investigation and preparation and delivery of the report.

IV.

EIGHTH POINT.

The Court of Appeals quoted from the decision in Express Publishing Co. v. Wilkins, 218 S. W. 614, as holding that negligence could not take the place of actual malice but that case involved a statutory defense by a newspaper, that it had indulged in only "a reasonable and fair comment or criticism" on an official act of a public official and under the Texas statute such comment was privileged. This holding therefore does not apply to this case.

NINTH POINT.

If this court should conclude that the decision in Express Publishing Co. v. Wilkins, 218 S. W. 614, does apply, then the associated doctrine that the defense of privilege does not extend to false statements of fact, should also apply.

The Wilkins decision, which was quoted by the Court of Appeals, involved a suit for damages on account of an alleged libel by a newspaper of a public official. I defended the suit on the ground that the comment was fair and reasonable, consequently in the absence of showing actual malice the privilege would be a sufficient defense under the statute, which was then Article 5597 and is now Article 5432, R. C. S. of Texas, 1925.

The court stated in the Wilkins decision that the privilege accorded newspapers by this statute was not absolute but could be destroyed by actual malice.

We doubt if these rules have any application or bearing on this case. We call the court's attention to the fact that if the court should be of the opinion that they apply then the following rule stated in *Ferguson* v. *Houston Press Co.*, 1 S. W. 2d 387, should also apply, viz.:

> "The privilege, however, of discussion in such cases does not extend to the making of false statements of fact, even though made in good faith and with reasonable cause to believe it true. The statement of fact published must be true in all respects" (p. 393).

Said decision was affirmed in 12 S. W. 2d 125, and for similar holdings see *Moore* v. *Leverett*, 52 S. W. 2d 252; *Bell Publishing Co.* v. *Garrett Engineering Co.*, 170 S. W. 2d 197; *A. H. Belo & Co.* v. *Looney*, 112 Tex. 160, 246 S. W. 777; *Galveston Tribune* v. *Johnson*, 141 S. W. 302, w. e. ref.

The report advised that all Superior Oil Company captains (of which Johns was one) should obtain an ATR rating (R. 279).

The trial judge recognized the fact that Johns had such a rating for more than five years before the report was made (R. 280).

Futhermore, the report baldly stated in discussing the qualifications of captains and crew pilots that:

> "None of the crew members currently employed by the Superior Oil Company are qualified for Airline Transport Rating" (R. 270).

Of course this was wholly false. Johns testified he had held such a rating since 1943 (R. 270).

Even a newspaper under the Wilkins decision would be held liable for this false statement of fact and the privilege would be no defense.

It was this sort of observations that resulted in Johns' discharge. The chief Pilot, Dewey Stewart, stated that Johns was discharged because of the report (R. 363).

CONCLUSION.

We believe that his is a case of first impression with reference to the right of a defendant to raise the defense of qualified privilege in a libel suit when the libel was committed in carrying out an illegal organization or combination engaged in unlawful activities.

If Johns had been libeled by a single insurance company there might be some merit to the defense advanced by Associated Aviation Underwriters but the tremendous size and power of the organization which libeled Johns makes the libel peculiarly oppressive and tyrannical.

In considering the legal propositions involved one cannot disassociate the practical consequences to Johns from the legal propositions considered. This libel destroyed him. This gigantic organization crushed him through blundering carelessness and with one haphazard move destroyed all his years of preparation, his skill and long experience as a careful pilot and the very core of his life. He had no interest but flying, which he loved and which the evidence shows he pursued with a passion and success from the time that he was a very young man.

He should not be denied a trial by jury. We ask that the decisions of the trial court and the Court of Appeals in favor of Associated Aviation Underwriters and its member companies be reversed and that this cause be remanded for trial.

Respectfully submitted,

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APPENDIX.

R. C. S. of Texas.

Article 7426. 7796 "Trusts."

A "trust" is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them for either, any or all of the following purposes: * * *

2. To fix, maintain, increase or reduce the price of merchandise, produce or commodities, or the cost of insurance, or of the preparation of any product for market or transportation.

3. To prevent or lessen competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or the business of insurance, or to prevent or lessen competition in aids to commerce, or in the preparation of any product for market or transportation.

4. To fix or maintain any standard or figure whereby the price of any article or commodity of merchandise, produce or commerce, or the cost of transportation, or insurance, or the preparation of any product for market or transportation, shall be in any manner affected, controlled or established.

5. To make, enter into, maintain, execute or carry out any contract, obligation or agreement by which the parties thereto bind, or have bound themselves not to sell, dispose of, transport or to prepare for market or transportation any article or commodity, or to make any contract of insurance at a price below a common standard or

figure or by which they shall agree in any manner to keep the price of such article or commodity or charge for transportation or insurance, or the cost of preparation of any product for market or transportation at a fixed or graded figure, or by which they shall in any manner affect or maintain the price of any commodity or article or the cost of transportation or insurance, or the cost of the preparation of any product for market or transportation between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or business of transportation or insurance, or the preparation of any product for market or transportation, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or purchase of any article or commodity, or charge for transportation or insurance or charge for the preparation of any product for market or transportation whereby its price or such charge might be in any manner affected. * * *

* * * * * * * *

(U. S. C. A., Title 15, Sec. 1012.)

Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948.

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Pro-*

vided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law. March 9, 1945, Ch. 20, Sec. 2, 59 Stat. 34; July 25, 1947, Ch. 326, 61 Stat. 448.

* * * * * * * *

(R. C. S. of Tex., Art. 5430.)

Article 5430. 5595 Definitions.

A libel is a defamation expressed in printing or writing, or by signs and pictures, or drawings tending to blacken the memory of the dead, or tending to injure the reputation of one who is alive, and thereby expose him to public hatred, contempt or ridicule, or financial injury, or to impeach the honesty, integrity, or virtue, or reputation of any one, or to publish the natural defects of any one and thereby expose such person to public hatred, ridicule, or financial injury. Acts, 1901, p. 30.

* * * * * * * *

Texas Insurance Code of 1951.

*Art. 3.57. Must Have Certificate of Authority.

No foreign or domestic insurance Company shall transact any insurance business in this State, other than the lending of money, unless it shall first procure from the Board of Insurance Commissioners a certificate of authority, stating that the laws of this State have been fully complied with by it, and authorizing it to do business in this State. Such certificate of authority shall expire on the day fixed by the Board under Articles 3.06 and 3.08 of this code and shall be renewed annually so long as the

company shall continue to comply with the laws of the State, such renewals to be granted upon the same terms and considerations as the original certificate.

* * * * * * * *

*NOTE—Similar to and based upon Article 4751, R. C. S. of Texas, 1925.

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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 159

CARROLL L. JOHNS, *Petitioner*,

v.

ASSOCIATED AVIATION UNDERWRITERS, ET AL., *Respondents*

ANSWER TO PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

	PAGE
STATEMENT OF THE CASE	1
QUESTIONS PRESENTED	6
REASONS FOR DENIAL OF THE PETITION FOR CERTIORARI	7
A. **Respondents and Superior had a mutual business interest in the investigation and report, and the alleged violations of the various State and Federal Regulatory Statutes would not deprive respondents of the defense of privilege which is secured to them under Texas law.**	9
B. **Under settled rules of Texas law, petitioner's evidence in this case was wholly insufficient to defeat the defense of privilege**	13
CONCLUSION AND PRAYER	19

INDEX OF AUTHORITIES

CASES	PAGE
Bruce's Juices v. American Can Co., 330 U.S. 743 (1946)	12
Carruth v. Dallas Gas Co., 282 S.W. 334 (Tex. Civ. App., 1920)	15
Cobb v. Garlington, 193 S.W. 463 (Tex. Civ. App., 1917)	15
Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902)	12
Express Publishing Co. v. Wilkens, 218 S.W. 614 (Tex. Civ. App., 1920)	15
Fitzjarrald v. Panhandle Publishing Co., 149 Tex. 87, 228 S.W. 2d 499 (1950)	10, 15
International & G.N.R. Co. v. Edmundson, 222 S.W. 181 (Tex. Comm. App., 1920)	9, 10, 14, 15, 16
Missouri Pac. Ry. Co. v. Richmond, 73 Tex. 568, 11 S.W. 555 (1889)	18
Small Co. v. Lamborn & Co., 267 U.S. 248 (1924)	12
St. Louis Southwestern Ry. Co. of Texas v. Pickel, 256 S.W. 273 (Tex. Civ. App., 1923)	17
Wilder Mfg. v. Corn Products Co., 236 U.S. 165 (1915)	12
Wortham-Carter Publishing Co. v. Littlepage, 223 S.W. 1043 (Tex. Civ. App., 1920)	18

PAGE

TREATISES

Newell on Slander and Libel, Sec. 577, p. 585 17
27 Tex. Jur., Libel and Slander, Sec. 35, p. 649 9
27 Tex. Jur., Libel and Slander, Sec. 50, pp. 682-683 10
5 Williston on Contracts (Rev. Ed.), Sec. 1661 12

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ANSWER TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents, Associated Aviation Underwriters, et al., respectfully present this their Answer to the Petition for Writ of Certiorari in the above-styled and numbered cause and pray that such Petition be in all things denied for the reasons hereinafter set out.

Statement of the Case

The petitioner's "Summary and Statement of Matter Involved", contained in the petition for certiorari, and the "Statement of the Case", contained in the supporting brief, consisting, as they do, of sweeping generalizations largely

unsupported in the record, the respondents deem it necessary to submit the following facts:

At all material times, Fireman's Fund Insurance Company and Fireman's Fund Indemnity Company, two of the respondents, were the insurers under certain aviation hull and liability insurance policies of the fleet of airplanes owned by Superior Oil Company (hereinafter referred to as "Superior"). R. 203, 204, 309, 446, 460, 461, insurance company defendants' Exhibits Nos. 1 and 2, introduced at R. 309, accompanying the record in the original). These two insurance companies reinsured or apportioned the risk of Superior's aviation operations among other insurance companies (including respondents) in accordance with certain written contracts entered into in New York City. (R. 204, 456-460)

Associated Aviation Underwriters (hereinafter referred to as "Associated") is the name of the Aviation Insurance Department of respondent insurance companies. As such, Associated inspected new risks and made periodic inspections and reports of the aviation facilities insured by respondent insurance companies. (R. 415-418) The purpose of such inspections was to better acquaint respondent insurance companies and their assureds with the risks insured and to be insured, and to determine that each assured was practicing all proper and necessary safety precautions to reduce loss of life and property. (R. 417, 226, 382, 441, 478, 481, 500, 510)

During the year 1948, petitioner was employed by Superior as one of its many airplane pilots and, as such, petitioner from time to time flew the airplanes owned by Superior and insured under the policies above mentioned.

At all material times hereto, each and every one of respondent insurance companies had and still have a valid permit to do business in the State of Texas. (R. 461)

Associated, through its agent, Paul W. Herbert, acting on behalf of the respondent insurance companies and in furtherance of business relations with Superior and to protect their mutual interests, made an inspection and investigation in the Fall of 1948 of the aviation facilities of Superior. (R. 383, 384, 415-417, 446, plaintiff's Exhibit No. 6, made a part of this record in the original) Such inspection was made with the specific approval, and under the direction and authority, of Superior's executives. (R. 387, plaintiff's Exhibit No. 6, introduced at R. 269, accompanying the record in the original)

Superior and Associated were both vitally interested in the inspection and investigation of Superior's aviation facilities. This interest was aroused in both Superior and Associated by the occurrence of two serious accidents involving Superior's airplanes, both of which resulted in loss of life or property. (R. 446) Each of these accidents caused enormous financial loss to respondent companies, and they may be described as follows:

(1) A DC-3 cracked up in Rome, Italy, on September 7, 1948, under circumstances indicating improper pilot technique in executing a landing. (R. 307, plaintiff's Exhibit No. 6, introduced at R. 269, accompanying the record in the original, and Exhibit A attached thereto);

(2) A DC-3 and all aboard it were lost over the North Atlantic. (R. 307, plaintiff's Exhibit No. 6, introduced at R. 269, accompanying the record in the original)

Following the inspection of Superior's aviation facilities, Herbert, under date of November 5, 1948, prepared a writ-

ten report, which was marked "Personal and Confidential". This report marked "Personal and Confidential" was delivered to Superior shortly after November 5, 1948. (R. 202) The subject matter of this report is indicated by its style, which was "Report on Superior Oil Company's Aircraft Operation". This report covers the fields of (1) maintenance, (2) operations, (3) qualifications for captains and pilots, (4) check outs, (5) examinations of flight personnel, (6) flight checks, (7) physical examinations, (8) cockpit check lists, (9) gross weight limitations, (10) weather minimums, (11) gas reserves, (12) alternate airports, (13) oxygen use, (14) turbulence and thunder storms, (15) minimum length of runway, (16) C.C.A. violations, (17) flying time, (18) Army technical orders and accident reports, (19) ratings for crew members, (20) hood and length trainer time, (21) rate of pay, (22) company subscribed navigation facilities, (23) and a full discussion of the background, education, training, experience, of the ten pilots employed by Superior, including Johns, the petitioner. (Plaintiff's Exhibit No. 6, introduced at R. 269, accompanying the record in the original)

The part of this 16 page report, marked "Personal and Confidential", of which petitioner complains is as follows:

> "2. *Operations*
>
> A. It is possible flight personnel employed have not been thoroughly investigated. This lack of investigation apparently pertains to both flying ability and background as well as personal traits and habits. This possibility is submitted as the writer was informed that in the past pilots were dismissed for (1) lack of flying ability, (2) failure to comply with Company's desires and verbal instructions, (3) poor personal habits and traits.

An indication of this is in the case of Carroll Lee Johns who was hired as a relief pilot. In checking with the previous employer we were unable to substantiate that Mr. Johns was anything other than an average pilot with questionable flying ability, as this employer lacked confidence in him as a pilot. In addition, we were informed that he had a poor personality and in substance there was much better pilot material available. A check with another source, who has flown with Mr. Johns and has known him personally for 7 or 8 years, could not develop any information which would qualify Mr. Johns to operate aircraft in accordance with the high standards desired by the Superior Oil Company." (Plaintiff's Exhibit No. 6, page 10, introduced at R. 269, accompanying the record in the original)

Prior to making the report, Associated had checked what it considered two very reliable sources regarding petitioner. One source was Samuel S. Sherwin who had known petitioner since 1938, had taken flying lessons from him, etc. (R. 393-397) The second source was Jake Moxness, Domestic Sales Manager of Douglas Aircraft Company. The latter had known petitioner when he worked for Douglas Aircraft Company during World War II. After making the report as above set out in quotes, the report continued with some 20 items of suggestions and recommendations regarding suggested improvements in Superior's aircraft facilities, among which was the following on page 11 of said report:

"4. If the information contained in this report in regards to Carroll Lee Johns is substantiated, it is recommended that the continued employment of Johns be reviewed by the Company to determine if any action is indicated." (Plaintiff's Exhibit No. 6, page 12, introduced at R. 269, accompanying the record in the original)

It is undisputed that Associated and the respondent insurance companies had nothing further to do with the distribution or dissemination of this confidential report after it was delivered to the assured Superior Oil Company.

Petitioner was discharged by Superior on November 22, 1948. (R. 203) He brought this suit as a cause of action for libel and slander, alleging that his employment was terminated because of Associated's confidential report in certain paragraphs of which reference was made to his capacity as a pilot.

It was the position of petitioner's employer, Superior Oil Company, that petitioner was discharged because he had flown the president of the company on a trip during which an auxiliary gasoline tank had leaked and saturated suitcases with gasoline, and that petitioner had not advised the president of this but had allowed the passengers to light matches and smoke during the flight under these dangerous conditions. (R. 331-341, 366-367, 371-372) It was further the position of Superior that petitioner had previously received a dishonorable discharge from the U. S. Army Air Corps (R. 322), and that during World War II petitioner had been discharged as a pilot by Douglas Aircraft Company. (R. 323-328)

Questions Presented

(1) The sole cause of action alleged by petitioner is that he was discharged as the result of an alleged libelous statement in a report prepared by respondents. Petitioner has never contended that respondents entered into any type of conspiracy for the purpose of injuring petitioner in his business. In a suit based solely on libel, is it relevant or material to such cause of action for petitioner to show that respondents' general busi-

ness activities were in violation of Texas or Federal Regulatory Statutes?

(2) It is a well settled rule of local substantive law in Texas that a defendant in an action for libel can be deprived of the defense of qualified privilege only by a showing of actual malice. Is this requirement satisfied when the petitioner's only contention is that the alleged libelous statement regarding him was based upon an allegedly insufficient or negligent investigation into petitioner's qualifications and background?

Reasons For Denial of the Petition for Certiorari

This case, involving only questions of proper application of settled rules of Texas substantive law, has been presented to two federal courts, both of which are well versed in Texas law. Both the District Court and the Court of Appeals have recognized that the case was a suit for libel governed by Texas law. These courts have accordingly ruled in the only way they could have ruled under the Texas law.

Petitioner has gone to some lengths to make of this case what it is not—a case involving substantial questions of public interest and importance concerning the state and federal anti-trust laws. In his effort to accomplish this purpose, he has distorted the record and has painted a misleading picture of a powerful combination bent on the destruction of an individual. For example, at page 3 of the petition, there is language concerning the alleged impossibility of petitioner's ever again obtaining employment as a pilot. Nothing in the record supports this and, indeed, the evidence is to the contrary. (R. 452-453) At page 16 of the petition, we find petitioner's statements to the same effect but again without supporting reference to the record. At

page 15 of the petition, we are told that Herbert, the investigator for Associated, admitted that he had no information concerning Johns' background, etc. Petitioner does not, and cannot, refer to the record as support for this. The evidence in the record is in fact to the contrary. Mr. Sweetser, West Coast Manager for Associated, interviewed Mr. Moxness of Douglas Aircraft Company regarding petitioner's qualifications as a pilot and obtained information which was inserted verbatim in the report as follows:

> "In checking with the previous employer we were unable to substantiate that Mr. Johns was anything other than an average pilot with questionable flying ability, as this employer lacked confidence in him as a pilot. In addition, we were informed he had a poor personality and in substance there was much better pilot material available."

Further, Herbert, the investigator for Associated, contacted one Samuel S. Sherwin who had known petitioner since 1938 and had taken flying instructions from him. The information obtained from Sherwin was inserted verbatim in the report as follows:

> "A check with another source, who has flown with Mr. Johns and has known him personally for 7 or 8 years, could not develop any information which would qualify Mr. Johns to operate aircraft in accordance with the high standards desired by the Superior Oil Company." (R. 392-410)

We are repeatedly advised, even as a factual matter, that respondents' interest in investigating and reporting the condition of Superior's aviation facilities was unlawful. Yet, the record clearly reflects that far from being unlawful, the interest shared by respondents, the insurer, and Su-

perior, the assured, was of the utmost importance and of unquestioned legality. It seems strange indeed to question these parties for their interest in preventing the continued occurrence of major air disasters involving the loss of human life; it is even more strange to hear such an interest condemned as unlawful.

Without laboring this point, respondents assert that this is an ordinary libel suit governed by Texas law. The two lower courts have correctly applied such law and the result could not be otherwise. To this law, and its application, we now turn.

A. Respondents and Superior had a mutual business interest in the investigation and report, and the alleged violations of the various State and Federal Regulatory Statutes would not deprive respondents of the defense of privilege which is secured to them under Texas law.

It is a settled rule of local law in Texas that a bona fide communication upon any subject matter in which the author has an interest or with respect to which he has a duty addressed to another person having a corresponding interest or duty is qualifiedly privileged. INTERNATIONAL & G.N.R. Co. v. EDMUNDSON, 222 S.W. 181 (Tex. Comm. App., 1920). The authorities cited by the petitioner (Brief 29-31) support this rule.

As stated in 27 TEX. JUR., Libel and Slander, Sec. 35, p. 649:

> "A communication made in good faith on any subject matter in which the person communicating has an interest, or with reference to which he has a duty to perform, is privileged if made to a person having

> a corresponding interest or duty, even though it contains matter which, without this privilege, would be actionable."

It is equally well settled in Texas that the question of whether a publication is privileged is a question of law for the Court.

> "Whether a publication is privileged or not is generally a question of law for the Court to determine. If the language used is not ambiguous, or where the facts and circumstances surrounding the publication are undisputed, it is for the Court to decide whether or not it was privileged." FITZJARRALD v. PANHANDLE PUB. CO., 149 Tex. 87, 97, 228 S.W. 2d 499, 505 (1950).

Where the publication, or the occasion of the publication, is determined to be qualifiedly privileged, the law raises the presumption of good faith and want of malice. It is then the burden of the complaining party to offer evidence, and obtain a finding, that the publication was made with express or actual malice. INTERNATIONAL AND G.N.R. CO. v. EDMUNDSON, supra; FITZJARRALD v. PANHANDLE PUB. CO., supra. See also 27 TEX. JUR., Libel and Slander, Sec. 50, pp. 682-683, where it is stated:

> "Where the evidence of a publication is conditionally or qualifiedly privileged, there is no presumption of malice; on the contrary the law raises the presumption of good faith and the want of malice, or, as said in some of the cases, the fact that the occasion is privileged rebuts the inference of malice prima facie."

See also the following language in FITZJARRALD v. PANHANDLE PUB. CO., supra, at 149 Tex. 96, 228 S.W. 2d 505:

> "In order for petitioner to recover damages for the publication of a statement that was privileged, the burden was on him to prove and obtain a finding that respondent was actuated by malice in publishing the article. This Court has repeatedly held that malice cannot be inferred from the character of the language used, if privileged, without other evidence to prove it."

The law is well settled in Texas that the defense of qualified privilege is available to a defendant in an action for libel. The petitioner's contention that a showing that these respondents were operating as a combination prohibited by Texas or Federal Regulatory Statutes deprives respondents of the defense of qualified privilege has no basis in either logic or authority. The mutual business interests of respondent insurance companies, the insurer, and Superior, its assured, in reducing the loss of life and property through operation of Superior's aviation facilities was clearly a lawful one. But assuming that at the time of the publication of the report respondents' general business activities were in violation of some State or Federal Regulatory Statute, it is yet quite clear that respondents are not for this reason deprived of their right to assert their defense of qualified privilege in this case. A careful examination of the Regulatory Statutes cited by petitioner discloses that the statutory penalties for violating the same are something other than forfeiture of right to defend or to assert all available legal defenses.

The violations of the regulatory statutes, if any existed, were brought about by the two contracts executed by and between the respondents in New York City whereby respondents apportioned insurance risks among themselves. This is completely extraneous to the transaction of which petitioner complains.

Furthermore, appellant cannot rely on such alleged violations of the Federal Statutes so as to deprive respondents of their right to assert the defense of qualified privilege. It is uniformly held that a contract (such as the insurance contracts between Superior and the two Fireman's Fund Companies) cannot be attacked collaterally on the ground that parties to such contracts are violating the anti-trust laws. WILLISTON ON CONTRACTS, Vol. 5 (Revised Ed.), Section 1661, in discussing the collateral effect of illegal combinations, states the rule as follows:

> "Though an agreement forming an integral part of a plan to restrain unreasonably is unenforceable, the parties are not thereby deprived of *ordinary civil rights;* therefore, they may enforce contracts not in aid of the unlawful restraint, even between themselves, *and still more clearly as against third persons.*" (Emphasis supplied)

The Supreme Court of the United States has held on numerous occasions that where contracts are between parties, one of whom may be in violation of the anti-trust laws, the contract itself is valid unless it is the direct cause of the violation. This rule has long been settled since the decision in CONNOLLY v. UNION SEWER PIPE CO., 184 U.S. 540 (1902), where the test applied under both the common law and the Sherman Act was whether the contract in issue could be proved without any reference to the alleged illegal combination. In accord, WILDER MFG. v. CORN PRODUCTS CO., 236 U.S. 165 (1915); SMALL CO. v. LAMBORN & CO., 267 U.S. 248 (1924); and BRUCE'S JUICES v. AMERICAN CAN CO., 330 U.S. 743 (1946).

Certainly, the contracts of insurance between the two Fireman's Fund Companies and Superior created legally

enforceable obligations which could be proved without reference to the alleged violations of the Sherman Anti-Trust Act, etc. If the insurance contracts between the two Fireman's Fund companies and Superior cannot be collaterally attacked, a fortiori, petitioner cannot attack the legality of the mutual business interests which Associated, respondent insurance companies, and Superior had with regard to the latter's aviation risk.

Petitioner's libel suit is a tort action. If petitioner's automobile collided with a train, would petitioner contend that the railroad company should be deprived of its defenses of contributory negligence, etc., on a showing that at the time of the collision the railroad company was in violation of State or Federal Regulatory Statutes? This is the exact principle which petitioner is asserting here.

B. Under settled rules of Texas law, petitioner's evidence in this case was wholly insufficient to defeat the defense of privilege.

As pointed out above, it once having been determined that a qualified privilege exists, the law raises a presumption of good faith and it becomes the burden of the complaining party to allege and prove the existence of circumstances which deprive the defendant of the privilege. Despite the petitioner's attempt to show the contrary, it is well settled in Texas that to sustain this burden of depriving the defendant of his privilege, the plaintiff must show that the publication was made with actual or express malice existing at the time of the communication. The existence of such malice can be established by the complaining party only by showing (1) that respondents did not believe the report to be true when it was published, or (2) that the

report was actuated by some sinister motive, or motive of ill will on the part of the respondents, or (3) that the report was made with such gross indifference to the rights of the petitioner as to indicate a willful or wanton disregard of petitioner's rights.

The local rule in Texas was early established by the Supreme Court of Texas in INTERNATIONAL AND G.N. RAILWAY CO. v. EDMUNDSON, supra. The Court there laid down the rule, 222 S.W. 181 at 183, as follows:

> "The malice which avoids the privilege is actual or express malice, existing as a fact at the time of the communication, and which inspired or colored it. Such malice exists where one casts an imputation which he does not believe to be true, or where the communication is actuated by some sinister or corrupt motive or motives of personal spite or ill will or where the communication is made with such gross indifference to the rights of others as will amount to a willful or wanton act."

Further commenting on the truth or falsity of the alleged libelous statement in the EDMUNDSON case, the Supreme Court of Texas used the following language:

> "While the charge was made without an investigation, and in reliance upon a report made by a detective agency, it is not shown that Martin at the date of the publication had any reason to doubt the correctness of the report.
>
> "Applying the language of the court in Hemmens v. Nelson, supra, to the present case, the question is not whether the charge was true or false, nor whether Martin had sufficient cause to believe that plaintiff did carry the passenger, or whether Martin acted hastily or through mistake, but the question is, the occasion being privileged, whether there is evidence for the jury

> that Martin knew or believed it to be false. Martin may have arrived at conclusions without sufficient evidence, but the privilege protects him and the defendant from liability on that ground until the plaintiff has overcome the presumption of good faith by proof of a malicious purpose to defame him under cover of the privilege."

This case has been consistently followed, has never been overruled or questioned, and is cited with approval in the latest pronouncement of the Texas Supreme Court on this subject. FITZJARRALD v. PANHANDLE PUB. CO., supra. Such decisions as CARRUTH v. DALLAS GAS CO., 282 S.W. 334 (Tex. Civ. App., 1920), cited at page 37 of petitioner's brief, have not changed this rule; the CARRUTH case is a decision of an intermediate court of appeal in Texas. Further, the case of COBB v. GARLINGTON, 193 S.W. 463 (Tex. Civ. App.), upon which the CARRUTH case, cited by petitioner, relied was decided before the EDMUNDSON case, supra, and this latter case clearly overruled the COBB case so far as they were inconsistent.

There is no evidence in this record to establish that respondents, or any of them, acted with actual or express malice, as that term is defined in Texas law, in making the report here complained of. The petitioner does not and cannot contend otherwise. Petitioner can only contend, as he does, that the burden of establishing the existence of such malice is met when he establishes negligence. This is not the rule in Texas. As stated in EXPRESS PUB. CO. v. WILKENS, 218 S.W. 614 (Tex. Civ. App., 1920),

> "Negligence (the Court's reference being to gross negligence) cannot take the place of actual malice. The inference to be drawn from the proof of gross negligence cannot be substituted for proof of actual

> malice so as to destroy the immunity from damages given to a privileged publication." 218 S.W. 614 at 619. (Parenthetical remark the writer's)

But regardless of the verbal label attached to the burden that petitioner must sustain to defeat the privilege, and whether it be malice, personal spite, willful or wanton misconduct or gross negligence, the authorities in Texas clearly demonstrate that the petitioner's showing here was wholly insufficient.

In INTERNATIONAL & G. N. R. Co. v. EDMUNDSON, supra, the plaintiff was discharged from his employment without any investigation of the charges lodged against him. In fact, an investigation demanded by the plaintiff had been repeatedly refused. There was evidence that the plaintiff was acquainted with the defendant's agent who wrote the allegedly libelous letter there involved and that such agent's attitude toward the plaintiff had been cool. Yet the Court held that the plaintiff had not made the showing required to defeat the defense of privilege. In the instant case, it will be noted, Herbert, who prepared the report complained of, did not know petitioner and had in fact never seen him. There was, in addition, an investigation with the advice of the parties interrogated concerning petitioner inserted verbatim in the report. (R. 396)

In the EDMUNDSON case above mentioned, the facts were undisputed that there was no investigation of the charge made against Edmundson, it was undisputed that as a result of the charge made against him, the person making the charge recommended that Edmundson be fired, it was undisputed that Edmundson was fired as a result of the charge made, and it was undisputed that the charge made against Edmundson was untrue. In spite of this, however, the Supreme Court of Texas stated:

> "If one makes a statement, believing it to be true, he will not lose the protection arising from the privileged occasion, although he had no reasonable ground for his belief." (Citing cases) 222 S.W. 184.

NEWELL ON SLANDER AND LIBEL, Section 577, page 585, states:

> "It is not necessary that before making such statement he should have thoroughly investigated the reports which had reached him. Hearsay is sufficient reasonable and probable cause in the absence of malice, unless he ought for any reason to have known that his informant was unreliable and his story undeserving of belief."

In ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS V. PICKEL, 256 S.W. 273 (Tex. Civ. App., 1923), the court, in holding a plaintiff's showing insufficient to rebut the presumption of good faith which accompanies a privileged communication, emphasized the following points:

> (1) the party charged with having libeled the plaintiff did not know him (Herbert did not know the petitioner and petitioner did not know Herbert (R. 373);
>
> (2) there was no evidence that there was any ill will toward the plaintiff. (There is no evidence in this record that there was any ill will toward petitioner. In fact, Herbert did not request petitioner's discharge but only recommended a review of his background to determine whether the information concerning him could be substantiated); (plaintiff's Exhibit No. 6, introduced at R. 269, accompanying the record in the original);

(3) The communication was strictly responsive to the inquiry of the addressee. (Here the report was made at the request of Superior and dealt strictly with the aviation facilities and personnel of Superior, a matter of mutual interest to Superior and respondents (R. 387);

(4) The allegedly libelous communication was not unduly published. (Here the report was marked "Personal and Confidential" and any distribution was made, not by respondents, but by Superior (R. 202);

(5) The communication was based upon information obtained from others acquainted with the plaintiff. (The report here was based upon information obtained from a past employer and a personal acquaintance of petitioner (R. 392-410);

(6) Nothing in the record indicated that the maker of the allegedly libelous communication had any motive other than furtherance of the welfare of his employer. (This record indicates that the report was made only for the purpose of protecting respondents and Superiors against continued occurrence of air disasters such as had occurred prior to the making of the investigation and report (R. 417, 226, 382, 441, 478, 481, 500, 510).

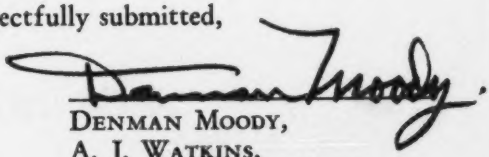
Compare, also, the showing of the plaintiff in MISSOURI PAC. RY. CO. v. RICHMOND, 73 Tex. 568, 11 S.W. 555 (1889), and in WORTHAM-CARTER PUB. CO. v. LITTLEPAGE, 223 S.W. 1043 (Tex. Civ. App., 1920), in both of which cases the showing was held insufficient, with that of petitioner in the instant case.

Conclusion

The case at bar involves nothing more than the application of well settled principles of Texas substantive law. Two lower courts, both familiar with such law, have correctly ruled that plaintiff has not established a cause of action.

WHEREFORE, respondents pray that the petition for writ of certiorari be denied.

Respectfully submitted,



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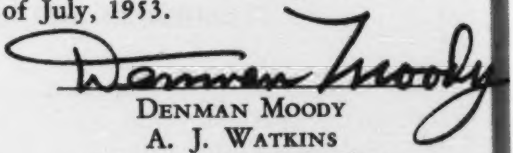
Certificate of Service

A copy of respondents' brief has been furnished to Mr. Fred W. Moore, attorney of record for the petitioner, Carroll Lee Johns, by depositing a copy thereof in the United States mails, addressed to him at State National Building, Houston, on this the 28 day of July, 1953.



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